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No. 09-1313

In The
Supreme Court of the United States

HAIDAR MUHSIN SALEH, et al.,

Petitioners,

v.

TITAN CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

SUPPLEMENTAL BRIEF

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The United States' brief acknowledges Petitioners' allegations "that they were beaten, raped, electrocuted, deprived of food and sleep, threatened by dogs, shackled in stressful positions, stripped, exposed to extreme heat and cold, and abused sexually and in other ways by respondents' employees." U.S. Br. 1-2. It acknowledges that "such conduct during an armed conflict is a war crime." *Id.* at 8. It acknowledges serious flaws in the court of appeals' reasoning. *Id.* at 7, 11. It nonetheless asks the Court to decline certiorari and permit further "percolation," and argues that certiorari is not necessary to ensure a remedy for torture victims or accountability for perpetrators:

> The United States has at its disposal a variety of tools, enhanced in the wake of events at Abu Ghraib, to punish the perpetrators of acts of torture, to prevent acts of abuse and mistreatment, and to compensate individuals who were subjected to abusive treatment while detained by the United States military.

Id. at 8.

Respectfully, this is false. No other remedy exists for Petitioners, and Respondents have suffered no consequences for their involvement in the serious violations committed at Abu Ghraib. By extending governmental immunities to for-profit corporations not under military command, the court of appeals has denied Petitioners' only vehicle for justice and accountability, and signaled to service contractors in Iraq and Afghanistan that they can escape financial

consequences for violations of their contracts and U.S. law. These errors warrant immediate review.

I. NO OTHER REMEDY EXISTS FOR THE ABUSES PETITIONERS SUFFERED

The United States committed to provide a remedy to victims of torture when it became a state party to the Convention Against Torture ("CAT") in 1990. Article 14(1) of CAT clearly states: "Each State Party *shall ensure* in its legal system that the victim of an act of torture *obtains redress* and has an *enforceable right to fair and adequate compensation* [. . .]" (emphasis added).[1]

Despite this commitment, no case brought on behalf of persons who have alleged that they have been tortured by U.S. actors, at U.S.-run detention facilities, or as a result of U.S. actions have been allowed to proceed to discovery or trial. The United States has opposed certiorari in every case brought by an alleged torture survivor, and the Supreme Court has not granted the writ. *See, e.g., El-Masri v. United States*, 552 U.S. 947 (2007); *Rasul v. Myers*, 130 S.Ct. 1013 (2009); *Arar v. Ashcroft*, 130 S.Ct. 3409 (2010);

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[1] *See* Brief of *Amici Curiae* Human Rights First, et al., at 5-8. Although that Article is not self-executing, it is well settled that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804).

Mohamed v. Jeppesen Dataplan, Inc., No. 10-778, 2011 WL 1832889 (2011).

The United States devotes pages of its brief to a discussion of the United States' opposition to torture and the various ways it could theoretically hold torturers accountable for their actions. The United States says that Petitioners have "instead" or "additionally" turned to tort law for accountability or redress – implying that other remedies are available. This is not accurate.

The two primary tools for accountability the government puts forward – criminal prosecution and compensation under the Foreign Claims Act – are subject to the sole discretion of the Executive Branch. Since 2004, the United States has declined to exercise that discretion on the victims' behalf.

Former Secretary of Defense Donald Rumsfeld testified at a Joint Hearing of Congress in May 2004 about the Abu Ghraib torture scandal. He stated, "I am seeking a way to provide appropriate compensation to those detainees who suffered grievous and brutal abuse and cruelty . . . It is the right thing to do. I'm told we have the ability to do so. And so we will – one way or another." Donald H. Rumsfeld, *Testimony Before the Senate and House Armed Service Committees,* May 7, 2004.[2] Seven years after this

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[2] *Available at* http://www.defense.gov/speeches/speech.aspx?speechid=118.

promise was made, Petitioners – the victims of grievous, brutal cruelty at Abu Ghraib – have received *no* compensation or redress.[3] The military cannot document a single payment under the Foreign Claims Act for abuses that occurred at Abu Ghraib. *See* P. Yost, *No Amends Yet for Abu Ghraib Abuse Victims*, Associated Press, Sept. 26, 2010.[4]

The Foreign Claims Act (FCA) states that the Secretary of Defense "may" compensate friendly foreign nationals harmed by non-combat activities of the military; it creates no obligation to do so, and gives victims no legally enforceable rights. *See* 10 U.S.C. §2734. The FCA applies to claims for damage caused by members of the Armed Forces "or by a civilian employee of the military department concerned," but not to abuses by civilian contractors. *Id.* The military has denied Iraqis' FCA claims in cases where contractors committed violence against civilians. *See* Brief of *Amici Curiae* Human Rights First, et al., at 8-9. In one case, the Army denied an FCA

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[3] Petitioner Saleh was offered compensation of $5,000 by the Army for negligence in his detention rather than for the abuses he suffered. Because this offer was conditioned on signing a release that he feared would jeopardize his ability to pursue action against the Respondents, he declined. The other Petitioners have not been compensated at all. The Army has stated that 30 claims related to Abu Ghraib remain under investigation, *see* Yost, *supra*, but given the discretionary nature of the Foreign Claims Act and time that has already passed, the chances that the claimants will be compensated are slim to nil.

[4] *Available at* http://www.msnbc.msn.com/id/39367966/ns/world_news-mideast_n_africa/t/no-amends-yet-abu-ghraib-abuse-victims/.

claim filed by the widow of an Iraqi civilian killed by private military contractors because "the alleged damage was committed by US contractors. These private contractors are not qualified governmental employees . . . and as such, their acts are not within the scope of the Foreign Claims Act." *See* American Civil Liberties Union, Documents Received From the Department of the Army in Response to ACLU Freedom of Information Act Request at Bates No. 555-557 (released on Oct. 31, 2007), *available at* http://www.aclu.org/natsec/foia/pdf/Army0555_0557.pdf.

Prosecutorial decisions are likewise at the Executive's discretion, and the Executive has stated regarding the possibility of prosecutions for torture that "this is a time for reflection, not retribution . . . nothing will be gained by spending our time and energy laying blame for the past."[5]

Despite separate findings by Major General Antonio Taguba, Major General George Fay, and the U.S. Army Criminal Investigation Division (CID), that the Defendants' employees had likely violated federal law, and referrals for prosecution, the Government has declined to prosecute any civilian contractor for his or her role in torture at Abu Ghraib. Both the Army CID and the Department of

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[5] White House Press Release, Statement of President Barack Obama on Release of OLC Memos, Apr. 16, 2009, *available at* http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/.

Justice have declined offers to interview Petitioners as potential witnesses.[6]

The non-criminal, non-FCA remedies that the United States cites have likewise proved ineffective. *See generally* Brief of *Amici Curiae* Retired Military Officers at 20-25. As the United States acknowledges, contractors were immune from actions in Iraqi courts until 2009. The "contractual remedies" alluded to in the United States' brief, U.S. Br. 9 (citing Department of Defense Section 1206 Public Law 108-375 Report 10-13 (2005) (hereinafter "DoD Report") have not been implemented in practice, in part because of the military's dependence on contractors to continue operations. *See* DoD Report 14 ("no known disciplinary actions were taken" against contractors or employees from May 1, 2003 to October 28, 2004). *See also* Congressional Research Service, Department of Defense Contractors in Afghanistan & Iraq: Background & Analysis, Mar. 29, 2011 (noting recent allegations that DoD does not know who is receiving U.S. contract funds in Afghanistan, allegations that money from U.S. contracts and subcontracts "has gone to local warlords and the Taliban" in Afghanistan, and criticism of DoD's "continued inability to accurately track contracts and contractor personnel."). Moreover,

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[6] *See* J. Phillips, *Inside the Detainee Abuse Task Force*, The Nation, May 13, 2011, *available at* http://www.thenation.com/article/160560/inside-detainee-abuse-task-force?page=full.

they do not directly address mistreatment of prisoners, and provide no remedy to third-party civilians.

The lack of an alternate remedy for victims of torture is not merely an equitable concern. It points to a major legal flaw in the court of appeals' preemption holding: the majority's decision to displace *all* tort law, state and federal, in the absence of any alternative regulatory scheme. *See* Pet. 24-37; Reply 15-16. As Judge Garland noted in his dissent below, in *Boyle*, the Court stated that "where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts [with] *and is replaced by federal rules*." App. 72-73 (quoting *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988)). The Supreme Court "does not normally preempt state law and simply leave the field vacant . . . Yet here, the court simply leaves the field." App. 73.

In contrast to *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), no comprehensive federal scheme governs government contractors in this case. There are federal criminal laws that regulate contractors' treatment of prisoners, but there is no precedent for finding federal criminal laws to "occupy the field" and preclude tort liability. *See* App. 59, n. 10 (Garland, J., dissenting).

The Geneva Conventions, Army Regulations, and Field Manuals governing the treatment of prisoners apply to contractors as well as members of the military, and to the extent that they conflict with state tort law, preemption would be appropriate. But no

such conflict exists. Petitioners have never sought to subject corporations' treatment of prisoners to the laws of "fifty-one separate sovereigns," U.S. Br. at 14. They have simply sought a common law remedy for actions that clearly violate U.S. law. This Court has repeatedly recognized that state tort remedies may further federal standards of care. *See Silkwood v. Kerr-McGee*, 464 U.S. 238, 253 (1984); *Medtronic, Inc. v. Lohr*, 518 U.S. 496 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 519 (1992). Doing so in this case would have been consistent with the Department of Defense's recent affirmation that the existing system of tort liability is an appropriate mechanism to deter contractor misconduct. *See* Pet. 19-20, 35, 38; U.S. Br. 13-15. Instead, the court of appeals made a policy decision that "the very purposes of tort law are in conflict with the pursuit of warfare," and that torture victims had no legally enforceable remedies in any court, under any laws. It is no exaggeration to say that this decision immunizes contractors serving in war zones, and leaves torture victims without any form of redress.

II. THE UNITED STATES' STATEMENT THAT CONTRACTORS CANNOT BE COMBATANTS UNDERMINES THE MAJORITY'S RATIONALE FOR "BATTLE-FIELD" PREEMPTION

Despite opposing certiorari, the United States' Brief identifies serious errors in the majority's extension of *Boyle* through the combatant activities

exception. Specifically, the United States finds that the majority "misunderstood the circumscribed role of private contractors in war zones." U.S. Br. 15. The United States rightly affirms that contractors cannot participate in combat:

> Under domestic and international law, civilian contractors engaged in authorized activity are not "combatants"; they are "civilians accompanying the force" and, as such, cannot lawfully engage in "combat functions" or "combat operations."[7]

Id.

This undermines the entire premise of the majority's "battle-field preemption" test, summarized by United States as applying "(1) '[d]uring wartime,' (2) 'where a private service contractor is integrated,' (3) 'into combatant activities,' (4) 'over which the military retains command authority,' (5) unless the contractor is providing services in 'such a discrete manner' that they 'could be judged separate and apart from combat activities of the U.S. military.'" U.S. Br. 18. If contractors cannot be integrated into combatant activities over which the military retains command authority, then it is inappropriate to use the combatant activities exceptions to FTCA preempt

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[7] Contrary to the majority's claim, which the U.S. relies upon, U.S. Br. 18, citing App. 13, Petitioners have consistently challenged the characterization of the detention of civilian detainees as a "combatant activity." *See, e.g.*, Pet. 32.

tort claims against them for conduct outside the scope of their contract.

The United States notes the majority's failure to address whether application of the preemption defense is appropriate if the contractor acts outside of the scope of their employment or contract. The United States finds the majority did not "address the contours of either such limitation." U.S. Br. 16. This omission is not minor. Rather, it reflects the omission of the entire test set out in *Boyle*, 487 U.S. at 512, and allows for immunity for independent and unapproved acts of the contractor, in violation of *Boyle*.

Given these legal errors, and the importance of providing a remedy for torture, Petitioners respectfully but strongly disagree with the United States position that review is not warranted "at this time." U.S. Br. 7. The United States speculates that future cases "could" result in the necessary "refinement and clarification of the scope and meaning of the court's holding." *Id.* Leaving aside the obvious impact of non-review on the Petitioners – who include the majority of Abu Ghraib victims seeking relief in U.S. courts – that is unlikely. Because government contractor defendants have argued for dismissal on so many separate legal grounds, "further percolation" of cases involving preemption of state claims are unlikely to surface precisely the same issues as those presented in this case. A hypothetical opportunity to review a decision that the United States recognizes is fundamentally flawed should not outweigh the pressing

need for this Court to clearly articulate the parameters of preemption in this area.

However, should the Court not grant a writ of certiorari, and decide instead to wait for another Circuit to apply the Federal Tort Claims Act's combatant activities exception to corporate government contractors before addressing the error presented in this case,[8] Petitioners respectfully urge the Court to summarily reverse and remand based on the clear errors identified by the United States and detailed by the Petitioners in their briefing.

Respectfully submitted,

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[8] Petitioners are aware of only one pending appeal which raises the government contractor-preemption questions at issue in this case, *Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700 (E.D. Va. 2009) (denying contractor's motion to dismiss state-law tort claims), appeal pending, No. 09-1335 (4th Cir.); *Al-Qurasihi v. Nakhla*, 728 F. Supp. 2d 702 (D. Md. 2010) (same), appeal pending, No. 10-1921 (4th Cir.). The court of appeals in the Fourth Circuit is holding these cases in abeyance pending resolution of this petition, and any future guidance from the Court in this area.